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NOTES AND COMMENTS

Federal Income Taxation—The Ups and Downs of the Education Expense Deduction

INTRODUCTION

Each year an increasing number of men and women in the United States are returning to college or business school in order to improve themselves in their chosen field of endeavor or to fulfill a requirement of their employer. Under the present Treasury regulations¹ some are allowed to deduct the costs of this additional education as an "ordinary and necessary" expense incurred in the carrying on of their trade or business, while others are not. Because of the close line which has been drawn, it is often difficult for a taxpayer to decide if his educational expenses fall into the deductible or non-deductible category.²

The objective of this discussion is to trace the development of the education expense deduction and to look at the present day application of the so-called "liberalized" regulations³ by the Internal Revenue Service and our courts.

THE HILL CASE

Prior to 1950 there was virtually no deduction for education expenses except in fringe areas.⁴ These deductions were disallowed by the courts on the ground of being either personal expenses⁵ or

¹ Treas. Reg. § 1.162-5 (1958).

² Generally the costs incurred for undergraduate college education and basic professional training have never been deductible, and this comment is not a discussion of this point. See Louis Aronin, 30 P-H Tax Ct. Mem. 993 (1961); Knut F. Larson, 15 T.C. 956 (1950); Lewis v. Commissioner, 8 T.C. 770, *aff'd*, 164 F.2d 885 (2d Cir. 1947); T. F. Driscoll, 4 B.T.A. 1008 (1926); J. D. Bowles, 1 B.T.A. 584 (1925). *But cf.* Michaelson v. United States, 203 F. Supp. 830 (D. Wash. 1961), *aff'd*, 313 F.2d 668 (9th Cir. 1963).

³ *Supra* note 1.

⁴ Alexander Silverman, 6 B.T.A. 1328 (1927) (college chemistry department head allowed deduction for attending scientific convention); Marion D. Shutter, 2 B.T.A. 23 (1925). Physicians were allowed to deduct expenses incurred while attending meetings and conventions of medical societies, but there is no definite indication that they were of an educational nature. See Robert C. Coffey, 21 B.T.A. 1242 (1931); Cecil M. Jack, 13 B.T.A. 726 (1928).

⁵ James M. Osborn, 3 T.C. 603 (1944) (no deduction allowed professor for doing scholarly research); T. F. Driscoll, 4 B.T.A. 1008 (1926) (no

non-depreciable assets.⁶

The first significant break-through in this area came in the case of *Nora Payne Hill*.⁷ The taxpayer was a school teacher who was required by state law to renew her teaching certificate every ten years. In order to meet this requirement she had to pass an examination on five books or complete three hours of college credit in courses which were acceptable to the school board. She chose the latter. This choice did not increase her salary since she was already receiving the maximum allowed. The taxpayer claimed a deduction for the expenses which she incurred on account of attending college.⁸ She argued that the expenses were ordinary and necessary expenses incurred in conducting her trade or business as a teacher in the public schools. She contended that the additional education made it possible for her to meet the requirements of the state law regarding renewal of her teaching certificate and helped her to sharpen the tools of her trade, *i.e.*, to maintain, not to better, the status which she had already achieved.

The Commissioner contended that the costs incurred by the taxpayer were personal in nature and not "ordinary and necessary"⁹ business expenses. He relied on a 1921 Office Decision,¹⁰ stating that costs incurred by teachers attending summer school were personal and non-deductible, and on the Treasury regulations then in force.¹¹

deduction for voice lessons anticipating professional engagements); Jay N. Darling, 4 B.T.A. 499 (1926) (no deduction allowed cartoonist for incidental expenses while studying sculpturing).

The Commissioner acquiesced in this position at all times. O.D. 984, 5 CUM. BULL. 171 (1921) (expenses incurred by doctors in taking post-graduate courses are personal); O.D. 892, 4 CUM. BULL. 209 (1921) (expenses of teachers attending summer school are personal). See also Treas. Reg. 111, § 29.23(a)-15(b) (1943); Treas. Reg. 103, § 19.23(a)-15(b) (1940).

⁶ This idea came about by way of dictum in *Welch v. Helvering*, 290 U.S. 111 (1933), where Justice Cardozo said: "Reputation and learning are akin to capital assets, For many, they are the only tools with which to hew a pathway to success. The money spent in acquiring them is well and wisely spent. It is not an ordinary expense of the operation of a business." *Id.* at 115-16.

⁷ 13 T.C. 291 (1949).

⁸ The deduction claimed was for room rent, traveling expense, tuition, and the estimated difference between cost of living at school and at home.

⁹ For good discussions of the legal definition of an "ordinary" expense see *Deputy v. DuPont*, 308 U.S. 488, 495-96 (1940); *Welch v. Helvering*, 290 U.S. 111, 114 (1933).

¹⁰ O.D. 892, 4 CUM. BULL. 209 (1921).

¹¹ Treas. Reg. 111, § 29.23(a)-15(b) (1943).

The Tax Court held for the Commissioner. The court stated that the taxpayer had not overcome the presumptively correct determination by the Commissioner that the expense was a personal one. The inference was made that since the taxpayer's certificate had expired she might not have been "employed" at the time she took the summer school courses, but rather incurred the expense to qualify for re-employment. The court also stated that for an expense to be "ordinary" it must be one of common or frequent occurrence in the particular occupation. In this instance it could not be assumed that teachers ordinarily attend summer school to obtain a renewal of their certificates when another method was available, *i.e.*, passing an examination on five books.

The Fourth Circuit Court of Appeals reversed.¹² The court said that "clearly, the very logic of the situation here shows that she went to Columbia *to maintain her present position, not to attain a new position; to preserve, not to expand or increase; to carry on, not to commence.* Any other view seems to us unreal and hypercritical."¹³

Thus, as a result of *Hill*, deductions for educational expenses were allowed if the education was undertaken to enable the taxpayer to meet a requirement necessary for the maintenance of his *present* position. However, once it appeared that the taxpayer was seeking to attain a *new* position, the deduction was to be disallowed.

THE TREND FOLLOWING HILL

After *Hill* the Commissioner promulgated I.T. 4044¹⁴ which modified the old 1921 Office Decision and allowed *Hill* to be followed where the facts were similar. This ruling stated that where a teacher incurred expenses in order to maintain her position, they would be deductible as ordinary and necessary business expenses. However, where the expenses were "incurred for the purpose of obtaining a teaching position, or qualifying for permanent status, a higher position, an advance in the salary schedule, or to fulfill the general cultural aspirations of the teacher,"¹⁵ they will be deemed personal expenses and not deductible.

In *Manoel Cardozo*¹⁶ the Tax Court was called on to apply the guidelines set out in *Hill* and in I.T. 4044. Here, the taxpayer, a

¹² *Hill v. Commissioner*, 181 F.2d 906 (4th Cir. 1950).

¹³ *Id.* at 909. (Emphasis added.)

¹⁴ 1951-1 CUM. BULL. 16.

¹⁵ *Id.* at 17.

¹⁶ 17 T.C. 3 (1951).

university professor, took a trip to Europe for the purpose of study and research. It was not necessary for him to take this trip in order to retain his position at the university. Indeed, the petitioner himself contended that the trip was undertaken to better equip himself to perform the duties of his present employment, to increase his prestige, and to attract opportunities in the fields of scholarship and education by improving his reputation for scholarship and learning. The court stated that neither *Hill* nor I.T. 4044 would allow the deduction asked for by the taxpayer.¹⁷ The fact was stressed that *Hill* required the taxpayer to incur the expenses either to maintain, preserve, or carry on his present position. Since the taxpayer in this instance was not *required* to make the trip for any of these purposes, the deduction was not allowed.¹⁸

In *George G. Coughlin*¹⁹ the petitioner was an attorney who handled tax matters in the course of his general practice. He claimed a business expense deduction for expenses incurred while attending the New York University Institute on Federal Taxation. The Tax Court denied the deduction because the taxpayer's objective was of a personal nature. The Second Circuit Court of Appeals in reversing²⁰ indicated that the situation presented was analogous to *Hill*.

¹⁷ Neither is a deduction allowed in connection with travel and study expenses incurred by a teacher on sabbatical leave unless the undertaking is required by the school for the maintenance of the teacher's position. Rev. Rul. 55-412, 1955 CUM. BULL. 318.

¹⁸ In *Knut F. Larson*, 15 T.C. 956, 958 (1950), the taxpayer agreed that the studies for which the deduction was claimed increased his earning capacity, and this, said the court, was enough to distinguish the case from *Hill*. The court said: "Thus, whether the expenses were undertaken as purely personal matters to improve petitioner's education and cultural attainments or in order to achieve improvement in his professional status . . . the result would be identical."

See Samuel W. Marshall, Jr., 24 P-H Tax Ct. Mem. 797 (1955), where the deduction was disallowed for music lessons to qualify the taxpayer for a position as a music teacher. This question was not raised on appeal. 240 F.2d 185 (5th Cir. 1957). In *Rhonda Fennell*, 22 P-H Tax Ct. Mem. 460 (1953), a deduction was allowed for expenses incurred by a librarian who, because of a ruling made by the Tennessee State Board of Education, had to have additional credits in library science courses to retain her position when the school in which she was employed exceeded a certain average daily attendance. See also *Richard Henry Lampkin*, 21 P-H Tax Ct. Mem. 507 (1952) (no deduction allowed for expenses incurred in connection with a doctor's dissertation); *Fred A. DeCain*, 20 P-H Tax Ct. Mem. 535 (1951) (no deduction for trips of an educational nature).

¹⁹ 18 T.C. 528 (1952). Four judges dissented without opinion.

²⁰ *Coughlin v. Commissioner*, 203 F.2d 307 (2d Cir. 1953). Also see *Anthony E. Spitaleri*, 32 T.C. 988 (1959) (no deduction for expenses incurred by a practicing accountant to take a law school correspondence

The court felt that the only difference between the two cases was in the degree of necessity which prompted the incurrence of the expenditures. The court stated:

It was a way well adapted to fulfill his professional duty to keep sharp the tools he actually used in his going trade or business. It may be that the knowledge he thus gained incidentally increased his fund of learning in general and, in that sense, the cost of acquiring it may have been a personal expense; but . . . the immediate, over-all professional need to incur the expenses in order to perform his work with due regard to the current status of the law so overshadows the personal aspect that it is the decisive feature.²¹

In *Robert M. Kamins*²² the taxpayer, who had been hired as an instructor by a university on a year to year basis, attempted to deduct a portion of the cost of getting a doctorate degree. The understanding between the taxpayer and his employer was that he would substantially complete his qualifications for a doctorate degree before a permanent contract of employment would be offered. Nevertheless, the taxpayer was appointed to a permanent position before completing the necessary prerequisite. In arguing for the allowance of the deduction, the taxpayer contended that he was in fact "maintaining" his position as set forth in *Hill* and I.T. 4044, and that the requirement of completing his doctorate was a condition subsequent to the attaining of the teaching position. The Tax Court disallowed the deduction. In its opinion it referred to a letter from a university official which stated that the degree was essential to the retention of the position. The court stated that even though the taxpayer was hired on a permanent basis before completion of his work, still, he was not fully and completely established in his chosen profession until he attained the doctorate degree. On this latter ground the case was distinguished from *Hill*.²³

course); *Musser v. United States*, 1957-1 U.S. Tax Cas. ¶ 9603 (N.D. Cal.) (deduction allowed for expenses incurred in attending a professional seminar).

²¹ *Coughlin v. Commissioner*, 203 F.2d 307, 309 (2d Cir. 1953).

²² 25 T.C. 1238 (1956).

²³ In *Richard Seibold*, 31 T.C. 1017 (1959), both husband and wife were school teachers. The husband held a permanent certificate permitting him to teach music, and his wife held a temporary certificate to teach the same subject. Both taxpayers took a European trip which included a two week course at the University of Geneva. The husband did not attend the course but was given two hours of credit toward his inservice requirement upon the

In *Clark S. Marlor*²⁴ the petitioner was hired as a tutor by the Board of Education of New York City. The board had a rule which provided that a tutor who did not meet the requirements for the position of instructor within five years from the date of his appointment would neither be eligible for promotion to the rank of instructor nor eligible for reappointment as a tutor. To meet this requirement a tutor had to demonstrate substantial progress toward a Ph.D. degree. In 1952 the petitioner claimed a deduction for expenses incurred in progressing towards his Ph.D. and contended that he incurred the expenses to retain his position as a tutor. The Tax Court, with three judges dissenting, upheld the Commissioner's contention that he expended the money in order to qualify himself for a higher rank. The dissent expressed the position that the expenditures were made for a *dual* purpose, *i.e.*, to qualify for a permanent position and to retain his temporary appointment, with the latter of the objectives being the more immediate. Thus, the petitioner's position is supported by *Hill*. In a per curiam reversal, the Second Circuit Court of Appeals said it agreed in all respects with the dissenting opinion of the Tax Court.²⁵

submission by him of a detailed report indicating the places he visited on the trip and his ideas of the benefits he attained from the trip. The Tax Court in rejecting the deduction of the husband's expenses said that this was merely a sightseeing trip and was not an "ordinary" way for a teacher to earn credit hours towards a requirement even though it was a permissible way. The court also pointed out that he did not take the trip essentially to secure the credits since he could have gotten three times the number of credit hours allowed him for no additional cost simply by attending the course at Geneva University. The wife attained six hours of credit by attending the course at Geneva, and she later went on to attain additional credits which together with the credits received at Geneva allowed her to obtain a permanent teaching certificate. In denying the deduction both for the trip to Geneva and the additional costs incurred in attaining the certificate, the court said she made the expenditures in order to acquire a position which she had never held before, *i.e.*, a permanent one. For this reason the court indicated that her situation was analogous to that of the taxpayer in *Kamins* and not *Hill* as was contended.

²⁴ 27 T.C. 624 (1956).

²⁵ *Marlor v. Commissioner*, 251 F.2d 615 (2d Cir. 1958). In *Robert S. Green*, 28 T.C. 1154 (1957), a deduction was allowed where the taxpayer was required by the local board of education to take additional college courses to maintain her advanced standing. The court was unconcerned with the fact that the taxpayer combined these courses with others in later obtaining a masters degree which led to a pay raise.

In *Bistline v. United States*, 145 F. Supp. 802 (D. Idaho 1956), the taxpayer was allowed a \$435.20 deduction on his 1948 return for unreimbursed travel expenses, hotel costs, and costs for tuition and books to attend a two week course in federal taxation in New York City. The issue of this deduction was not raised on appeal. 260 F.2d 80 (9th Cir. 1958).

THE NEW REGULATIONS UNDER THE 1954 CODE

The discussion up to this point has involved only cases which arose under the 1939 Code. With the enactment of the 1954 Code, a change took place in the education expense deduction area.

To understand the reason for the change which occurred, we must look to the Commissioner's new regulations.²⁶ This set of regulations was promulgated in 1958 and made to apply retroactively to all 1954 Code years.²⁷ They came about mainly as a result of pressure being put on Congress for legislative action in this area.²⁸ At the time of their promulgation, a bill, extremely liberal in nature (although affecting only teachers), was pending before Congress.²⁹ When the Treasury Department announced the new regulations, the sponsor of the pending legislation stated that they obviated the necessity of enacting his bill.³⁰ These regulations were hailed as a "liberalization" of the policy governing education expenses, and it was estimated by the National Education Association that they would save teachers alone \$20 million annually.³¹

These regulations provide in part as follows:

(a) Expenditures made by a taxpayer for his education are deductible if they are for education (including research activities) undertaken primarily for the purpose of:

(1) Maintaining or improving skills required by the taxpayer in his employment or other trade or business, or

(2) Meeting the express requirements of a taxpayer's employer, or the requirements of applicable law or regulations, imposed as a condition to the retention by the taxpayer of his salary, status or employment.³²

As we shall see, the genuine "liberalization" which the taxpayers expected from these regulations was not to be forthcoming. Instead,

²⁶ Treas. Reg. § 1.162-5 (1959).

²⁷ Technical Amendments Act of 1958, § 96, 72 Stat. 1606, 1672.

²⁸ NEA News Bulletin, May 1958, p. 13, col. 2.

²⁹ H.R. 4662, 85th Cong., 1st Sess. (1957). This proposed legislation would have allowed a teacher to deduct expenses paid during the taxable year for the furtherance of his education. This deduction would have been limited to \$600 per annum and would have been a deduction *from* adjusted gross income. Such a deduction was not to be allowed under this section if it was allowable as a trade or business expense deduction under Section 162 of the 1954 Code.

³⁰ NEA News Bulletin, *supra* note 28.

³¹ *Ibid.*

³² Treas. Reg. § 1.162-5(a) (1959).

due to the Commissioner's strict and narrow construction of these innovations, the question of educational expenses has become one of the more litigated in the federal income tax field.

THE INITIAL INTERPRETATION OF THE NEW REGULATIONS

*John S. Watson*³³ was the first case to arise under these new regulations. The taxpayer, a physician who specialized in internal medicine, used "psychosomatic medicine" in his practice. After practicing for a few years, he decided to obtain further training in psychiatry. The training was undertaken on a completely voluntary basis and did not lead to any additional degree or certificate. The taxpayer contended that it would enable him to do a better job of practicing internal medicine. The Commissioner in contesting the deduction allowance argued that the taxpayer had not proven it to be *customary*³⁴ for a specialist of internal medicine to undertake a course of this type.

The Tax Court in allowing the deduction³⁵ stated that it was not absolutely necessary for the taxpayer to show that such training was customary. Instead, the court felt that the emphasis should be placed on the *primary purpose* of the additional education. The court stated:

Though the course was specialized, petitioner was not pursuing it for the purpose of fitting himself to engage in the specialty. He continued to practice as an internist but with skills presumably sharpened by his additional training in analysis and psychiatric techniques.³⁶

Less than a year later *Arnold Namrow*,³⁷ one of the leading cases in this area, came before the Tax Court. The two petitioners were engaged in the practice of psychiatry. They enrolled in a psycho-analytic institute for training in the practice and theory of psycho-analysis. In addition to tuition and fees, they incurred expenditures for a personal analysis and for the services of a supervising analyst. The petitioners contended that this additional training was primarily undertaken to improve their skills as psychiatrists and should be deductible as a business expense. The Commissioner argued that

³³ 31 T.C. 1014 (1959).

³⁴ This is the guideline set forth in Treas. Reg. § 1.162-5(a) (1958).

³⁵ Four judges dissented without opinion.

³⁶ 31 T.C. 1014, 1016 (1959). The court says the taxpayer comes under example (2) of Treas. Reg. § 1.162-5(e) (1959).

³⁷ 33 T.C. 419 (1959).

psychoanalysis is a medical specialty and not merely a technique of psychiatric therapy and, therefore, the taxpayers were obtaining a new specialty. A majority of the court disallowed the deduction and stated that "the purpose of their attendance . . . was to obtain a new or substantial advancement in position and the training they were undertaking . . . was to satisfy the minimum requirements for each petitioner to establish himself as a practitioner in the special technique of psychoanalysis."³⁸ The court pointed out that each student at the institute promised not to hold himself out as a psychoanalyst until so authorized by the institute and that most of the patients which the taxpayers would treat by use of psychoanalysis would be referrals from colleagues at the institute. Thus, it would be unlikely for a psychiatrist to establish a psychoanalytic practice unless he attended the institute.

Five judges dissented on the ground that the facts showed psychoanalysis to be merely an intensive form of psychotherapy, the most common form of treatment used by psychiatrists. The dissenting judges felt that the expenses were incurred by the taxpayers to maintain or improve their skills required in the practice of psychiatry rather than to obtain a new specialty.³⁹

The disallowance of the deduction was affirmed by the Fourth Circuit Court of Appeals⁴⁰ on the ground that the findings of the Tax Court were not so clearly erroneous as to compel a reversal.⁴¹ The court rationalized that the true purpose and effect of an expense governs its deductibility,⁴² and the court felt that the taxpayers expended money and time in order to secure recognition in the eyes of their professional brethren as competent psychoanalysts. However,

³⁸ *Id.* at 434. The majority rejected the argument that the payments made for services of supervising analysts were in effect consultation fees. They held that these fees were incurred as a part of the required supervised clinical work of the institute and any benefit which the patient received from them was incidental.

³⁹ The dissenters would allow the deduction of the fees paid for supervising analysts as ordinary and necessary business expenses regardless of whether or not all the expenses are deductible education costs.

⁴⁰ *Namrow v. Commissioner*, 288 F.2d 648 (4th Cir.), *cert. denied*, 368 U.S. 914 (1961). For a more recent case in accord where the taxpayer was both a practicing psychiatrist and part-time teacher of psychiatry, see *Grant R. Gilmore*, 38 T.C. No. 76 (1962).

⁴¹ Where there is sufficient evidence to support the lower court's position, it will not be reversed unless the findings of fact are clearly untenable and erroneous. See *Commissioner v. Duberstein*, 363 U.S. 278, 290-91 (1960); *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

⁴² *Weiss v. Stearn*, 265 U.S. 242 (1924).

while of no monetary benefit to the taxpayers, the court did conclude that "the basic question of fact, whether psychoanalysis requires the acquisition of a new skill or the improvement of one already possessed, still remains to be answered" ⁴³ Thus, the result seems to rest upon the fact that psychoanalysis is in effect regarded as a specialty "by a large body of medical opinion without whose approval it cannot be successfully practiced." ⁴⁴

Upon an examination of *Watson* and *Namrow*, a distinction, though narrow in scope, can be seen. If the taxpayer is felt by the court to be "running in place," *i.e.*, maintaining his present position, the deduction will be allowed. On the other hand, if the court feels he has "taken a step upwards," *i.e.*, obtained a new and superior position, the deduction will be disallowed.

This distinction, although in line with the rule of *Hill*, appears unharmonious with the supposed liberalization of the education expense deduction. When the new regulations were promulgated, the Treasury Department reportedly stated that the new ruling would cover the "cost of courses taken to keep one's skills on a par with those of colleagues and competitors" ⁴⁵ This seems to recognize the fact that in our modern day society a person cannot remain static upon attaining the minimum requirements in his chosen occupation. He must be constantly improving his knowledge, understanding, and ability in his field of endeavor in order to keep up with changing conditions. It appears that neither the Commissioner nor the courts are adequately recognizing this factor in their application of the regulations.

Also, when appraising this area of the tax law, it must be kept in mind that most of the claims for deduction will be for relatively small amounts, and the taxpayers will, in most instances, contest the non-allowance of the deduction, if at all, without legal counsel. ⁴⁶ Thus, the Commissioner's harsh application of his regulations and

⁴³ 288 F.2d 648, 652 (4th Cir. 1961).

⁴⁴ *Id.* at 653. The contention that the expenses were deductible as medical expenses was rejected unanimously by both the Tax Court and the appellate tribunal.

⁴⁵ New York Times, April 4, 1958, p. 23, col. 8.

⁴⁶ The deduction is further minimized if the taxpayer is an employee as distinguished from a self-employed individual. In the case of an employee, the education expense deduction will be a deduction from adjusted gross income and can be claimed only if the taxpayer does not elect the standard deduction. See *Hartrick v. United States*, 205 F. Supp. 111 (N.D. Ohio 1962); *William E. Thompson*, 26 P-H Tax Ct. Mem. 229 (1957).

the strict view of the courts as exemplified by *Namrow* are making it extremely difficult for the deduction to receive widespread use.

RECENT DEVELOPMENTS

From 1960 to the present, cases in this area have been coming before the courts in rapid succession. In some cases it has been clear that the taxpayer had incurred a non-deductible expense.⁴⁷ In other instances the courts have adhered to the so-called "liberal spirit" of the regulations and have allowed the deduction.⁴⁸ How-

⁴⁷ In *Bernd W. Sandt*, 30 P-H Tax Ct. Mem. 997 (1961), *aff'd*, 303 F.2d 111 (3d Cir. 1962) and *Roger A. Hines*, 30 P-H Tax Ct. Mem. 1123 (1961), *aff'd*, 303 F.2d 111 (3d Cir. 1962) the petitioners were research chemists. They were promised jobs as patent chemists if they obtained a legal education. The court reasoned that the primary purpose of the additional education was to obtain a new position, and on this ground the deduction was denied.

It has been held that where government employees hold jobs which do not require legal training, expenses incurred in obtaining a law degree will not be allowed as a deduction. See *James J. Engel*, 31 P-H Tax Ct. Mem. 1441 (1962); *Louis Aronin*, 30 P-H Tax Ct. Mem. 993 (1961).

See also *Soloman Diamond*, 1963 P-H TAX CT. REP. & MEM. DEC. (32 P-H Tax Ct. Mem.) ¶ 63, 037; *Ansis Mitrevics*, 1963 P-H TAX CT. REP. & MEM. DEC. (32 P-H Tax Ct. Mem.) § 63, 067; *Frederick T. Simon*, 31 P-H Tax Ct. Mem. 1072 (1962); *Maude A. Schinnagel*, 31 P-H Tax Ct. Mem. 638 (1962); *James J. Condit*, 31 P-H Tax Ct. Mem. 1446 (1962); *Daniel Kates*, 31 P-H Tax Ct. Mem. 1545 (1962); *Morris S. Schwartz*, 30 P-H Tax Ct. Mem. 795 (1961).

⁴⁸ In *Woodward W. Hartrick*, 1963 P-H CT. REP. & MEM. DEC. (32 P-H Tax Ct. Mem.) ¶ 63,036, the taxpayer held a provisional teaching certificate and took courses to get the certificate renewed as required by the school board. These courses also led towards a degree in elementary education, but the court refuted the contention of the Commissioner that the taxpayer was meeting the minimum requirements of her trade or business. The court held that the taxpayer was already employed in her trade or business and was undertaking the additional education to maintain her employment, not to obtain it.

In *James E. Lane*, 31 P-H Tax Ct. Mem. 1089 (1962), the taxpayer took courses related to those which he taught even though they also led to a master's degree. The court concluded that the primary purpose of the expenditure was to improve the quality of the taxpayer's teaching with all other motives being secondary and immaterial.

In *Ruth Domigan Truxall*, 31 P-H Tax Ct. Mem. 795 (1962), the taxpayer, a teacher holding a permanent certificate, took a trip to Mexico. She received semester hours credit for the trip, which additional credit was needed in order that she could meet the schedule for annual advancements that the school board had set up (*i.e.*, she would have lost salary rights had she not fulfilled this obligation although her certificate and job were not in jeopardy).

In *Peggy A. King*, 31 P-H Tax Ct. Mem. 551 (1962), the taxpayer incurred expenses in quest of a Ph.D. degree. The taxpayer was a trained social worker and was employed by the public school system in the field of behavioral sciences. She obtained a leave of absence to pursue the Ph.D. degree in education, and even though the taxpayer later abandoned the

ever, inconsistency on the part of the courts in applying the regulations has been significant.

In 1960 the Commissioner attempted to alleviate the problems in this area by issuing Revenue Ruling 60-97.⁴⁹ This ruling was an effort to establish additional guidelines for the treatment of expenses incurred for education. In regard to the allowance of the deduction

effort, the court felt that this work was undertaken primarily to maintain and improve her skills in this field. The court also found from the evidence that it was common and usual for people to obtain additional education in this field.

In *Elmer R. Johnson*, 30 P-H Tax Ct. Mem. 641 (1961), *aff'd*, 313 F.2d 668 (9th Cir. 1963), the taxpayer had to take additional courses in order to obtain a new emergency teaching certificate. The fact that these courses helped her to later get a permanent certificate was held to be incidental by the court.

In *Smith v. United States*, 7 Am. Fed. Tax R.2d 1238 (N.D. Fla. 1961), the taxpayer took a trip to Europe and claimed 90% of her total costs as a business expense. The taxpayer was a college teacher, and the jury found that the trip was taken primarily to maintain and improve the skill required by the taxpayer in her job.

In *Michaelson v. United States*, 203 F. Supp. 830 (E.D. Wash. 1961), *aff'd*, 313 F.2d 668 (9th Cir. 1963), the taxpayer incurred expenses in taking courses which allowed him to renew a provisional teaching certificate although these courses also led to a permanent teaching certificate and a Bachelor of Law degree.

In *Laurie S. Robertson*, 37 T.C. 1153 (1962), *acq.*, 1963 INT. REV. BULL. No. 8, at 7, the taxpayer incurred expenses in an effort to obtain a Ph.D. degree although this goal was never achieved. The taxpayer was hired as a college instructor and was reappointed annually for five years at which time he was given a leave of absence to complete his Ph.D. The current policy of the college was that tenure could not be granted until he attained a Ph.D. degree. The court found as a fact that this policy was enacted subsequent to the hiring of the petitioner and for this reason rejected the Commissioner's contention that the job was originally taken on a conditional basis. The court concluded that this educational requirement was imposed by the university as a condition upon the taxpayer for the retention of his salary, status, and employment.

In *Reuben B. Hoover*, 35 T.C. 566 (1961), *acq.*, 1961-2 CUM. BULL. 4, a partial deduction was allowed for costs incurred by the petitioner in going on a "medical seminar cruise" although the trip was taken primarily for pleasure. The court felt that the taxpayer did receive some professional benefit from part of the trip which included medical lectures and discussions.

In *Evelyn L. Sanders*, 29 P-H Tax Ct. Mem. 364 (1960), a deduction was allowed for expenses incurred by a teacher of art and geography in taking a trip abroad. Approved traveling was one means of meeting a school board requirement, and the board approved this trip. The court reasoned that the petitioner's travel activities bore a logical relationship to the courses which she taught and constituted a normal and natural response in light of the school board's requirement.

See also *Donald C. Hester*, 1963 P-H TAX CT. REP. & MEM. DEC. (32 P-H Tax Ct. Mem.) ¶ 63,107; *Lonnie R. Lenderman*, 1963 P-H TAX CT. REP. & MEM. DEC. (32 P-H Tax Ct. Mem.) ¶ 63,110.

⁴⁹ 1960-1 CUM. BULL. 69.

under the theory that the expense was incurred for the maintaining and improving of skills, the ruling stated:

[I]t is necessary that the taxpayer show his purpose through specific facts. In this connection it will be necessary for him to establish that the education does maintain or improve skills required in his employment or other business. *The skills "required" by the taxpayer in his employment or other trade or business are those which are appropriate, helpful, or needed.*⁵⁰

The most significant fault in this area today lies in the fact that the courts are reluctant to place a proper interpretation on the last preceding quoted sentence of the revenue ruling. This fault appears to be the main reason for the inconsistency in the following illustrations.

In *Evelyn Devereaux*⁵¹ the taxpayer was a university instructor under a contract of permanent tenure. There was no requirement that he undertake any additional studies leading to a Ph.D. degree in his field. The facts, however, indicate that studies leading to a Ph.D. degree were undertaken before the taxpayer was given a contract of permanent tenure in an effort to induce the university to renew his contract and secure his position. Since the Commissioner could not argue that these expenses were incurred to meet the minimum requirements of the taxpayer's chosen profession, he contended that they were incurred primarily for the purpose of attaining substantial advancement in position and an increase in salary. The Tax Court agreed with the Commissioner's contention and disallowed the deduction.⁵²

The petitioner in *Devereaux* acting as his own counsel on this claim which totaled less than 2000 dollars, appealed the result of the Tax Court and emerged with a victory.⁵³ The Third Circuit recognized the fact that the regulations in this area are intended to be liberally enforced. The court, however, based its reason for the reversal on less than satisfactory grounds. The court indicated that the taxpayer owed the university a "moral" obligation to continue

⁵⁰ *Id.* at 70. (Emphasis added.)

⁵¹ 29 P-H Tax Ct. Mem. 509 (1960).

⁵² *Quaere* what the petitioner could have undertaken which would have been any more appropriate and helpful in the teaching field.

⁵³ *Devereaux v. Commissioner*, 292 F.2d 637 (3d Cir. 1961).

his studies leading to a Ph.D. degree in light of the fact that he used this additional education as an inducement for renewal of his contract. Therefore, the court concluded that the taxpayer was maintaining his position by undertaking the studies, and that any promotion or salary increase as a result of attaining the Ph.D. degree would be incidental.⁵⁴ While the result seems correct, the court, nevertheless, failed to recognize that a taxpayer may incur educational expenses in an attempt to "run-in-place" although such education leads to a doctorate degree and an advancement in salary.

In *Joseph T. Booth, III*⁵⁵ the petitioner, after attaining a law degree and practicing for a short time, worked as an assistant legal advisor to the Governor of Alabama. Later he and two other attorneys decided to open a practice together. He was designated to attend New York University for the purpose of taking some tax courses since it was agreed that none of the three partners-to-be had enough knowledge in this field. The facts revealed that the taxpayer had not taken any tax courses in law school; that he had handled no tax cases during the brief period in which he had practiced; and that he had not handled any tax matters while working as advisor to the Governor of Alabama. The taxpayer contended that the courses were taken primarily to improve skills which he required in practicing his profession. On the other hand, the Commissioner argued that the expenses were incurred in order that the taxpayer could acquire a new skill or specialty and obtain a new position. In disallowing the expenditures, the Tax Court concluded that the primary purpose of the education was to enable the taxpayer to become a partner in the newly formed law firm.

Perhaps on the facts presented in *Booth*, the petitioner did fail the "primary purpose" test. For this reason the result appears satisfactory. However, a more difficult question would have been presented if the obtaining of a new position had not been a pertinent factor. The Commissioner, assumedly, still would have attacked the allowance of the deduction on the ground that the taxpayer was acquiring a new skill or specialty. In light of *Namrow* the court might agree with this position. But it is questionable whether this attack would be a valid one in light of the regulations and Revenue Ruling 60-97. Admittedly, the taxpayer had attained the minimum

⁵⁴ The court rejected the Commissioner's contended applicability of example (9) of Rev. Rul. 60-97, 1960-1 CUM. BULL. 69, 77-78.

⁵⁵ 35 T.C. 1144 (1961).

requirements necessary for the practice of his profession. But it is believed that the taking of tax law courses by an attorney is *appropriate, helpful, and needed to improve and maintain his skills in the legal field*. It is suggested that the court should allow the deduction in such a case if the regulations and Revenue Ruling 60-97 are interpreted in the proper light.

A case coming close to *Booth* on its facts and reaching a contrary result is *Cosimo A. Carlucci*.⁵⁶ The taxpayer was employed as an assistant research analyst in the field of industrial psychology by an insurance company. He had attained several credit hours leading to a Ph.D. degree in industrial psychology, and in 1958 he took nine additional credit hours towards this degree. It was not necessary for the retention of his job that he obtain this degree, nor was it a prerequisite leading to a promotion, although over the long run his chances of a promotion or a salary increase would obviously be enhanced. The petitioner contended that it was necessary for him "to keep abreast of current knowledge, literature, and thinking in the field, and that his purpose in taking such courses was to accomplish that result and to maintain and improve his standing, in terms of knowledge, as an industrial psychologist"⁵⁷ The Tax Court looked to the fact that he had already met the minimum requirements of qualification in his chosen field, and to the fact that many other persons employed in psychological research by the taxpayer's employer, either had Ph.D. degrees or were doing work towards a graduate degree. This latter fact indicated to the court that such additional education was customary in this field. Thus, the Tax Court in *Carlucci* appeared to make an effort to carry out the intended spirit of the regulations.

It was soon to be apparent that the thinking of the court in *Carlucci* was predicated largely on the "custom" of the additional education in the psychology field rather than on the more important consideration that the education was *appropriate, helpful, and needed*. This conclusion is substantiated by the result of the Tax Court in *Harold H. Davis*.⁵⁸ In this case the taxpayer was a college professor on permanent tenure and was not required to undertake any additional scholarly duties in his field. However, the college did

⁵⁶ 37 T.C. 695 (1962).

⁵⁷ *Id.* at 700-01.

⁵⁸ 38 T.C. 175 (1962), *appeal docketed*, No. 18188, 9th Cir., July 23, 1962.

encourage its professors to engage in research and writing activities. Accordingly, the petitioner took a trip to Europe for the purpose of studying source material, unavailable in the United States, for a book in his field which he desired to write. The majority held that the expenses were voluntary and were undertaken so that the taxpayer could increase his prestige as a scholar. It was concluded that the expenses were incurred to acquire additional reputation and learning, and thus cannot be classified as ordinary and necessary business deductions.

Six judges dissented from the result of *Davis*. They felt that the expenses could be classified as ordinary and necessary so long as they were *appropriate* to the profession of the taxpayer. Clearly the thinking of the dissent is correct if the regulations and Revenue Ruling 60-97 are to be given meaningful interpretation.⁵⁹ If the view of the dissent is not adopted by the Ninth Circuit Court of Appeals in its review of this case,⁶⁰ it will amount to a significant step in the wrong direction. Certainly the facts of *Davis* fall within the guidelines which have been issued to help the taxpayers and the courts in this area, *i.e.*, the expenses were appropriate and helpful for the maintenance of the taxpayer's skills.

CONCLUSION

Much progress has been made in this area since the *Hill* case in 1950. To a large extent this has been made possible by the willingness of the courts, except in *Namrow* and *Davis*, to apply the regulations in a liberal manner. The Commissioner, however, still seems unwilling to "fall in step" with the intended spirit of the regulations. As a result of this, many taxpayers probably lose what should be valid deductions due to the expense which would be involved in attempting to litigate a small claim. The Commissioner's attitude and attacks impair success of any attempt to forward education as the

⁵⁹ *Dennehy v. Commissioner*, 309 F.2d 149 (6th Cir. 1962), *affirming* 30 P-H Tax Ct. Mem. 821 (1961), involved facts very similar to those in *Davis*. The taxpayer, a full time college math instructor, took a trip to Europe during his sabbatical summer. The facts revealed that his activities on this trip were no different from those of most tourists taking a European trip. Both the Sixth Circuit Court of Appeals and the Tax Court denied him a deduction for these expenses. It appears that there is a definite factual distinction between *Dennehy* and *Davis*, and it is suggested that this distinction is such that it was proper to deny *Dennehy* the deduction while it was improper to treat *Davis* in the same manner.

⁶⁰ *Appeal docketed*, No. 18188, 9th Cir., July 23, 1962.

means of professional improvement. Perhaps legislation in this area will eventually be necessary if we are to attain such a goal. In conclusion, the following statement of the district court judge in *Michaelson v. United States* concerning the importance of this deduction to the "little" taxpayer seems appropriate:

The importance of encouragement of individuals interested in self-improvement should not be minimized. Certainly rapid write-offs of investments in buildings, deductions for advertising and deductions for expenses in those higher brackets, are no more important to them than a smaller deduction is to one who has limited funds, as the taxpayer here.⁶¹

H. ARTHUR SANDMAN

Conflict of Laws—Capacity to Sue—Which Law Should Govern?

It is generally accepted that the law of the place of wrong determines whether a person has sustained a legal injury.¹ In *Shaw v. Lee*² this rule was applied to determine the capacity of one spouse to sue the other. Plaintiff brought suit against her deceased husband's estate alleging that while riding through Virginia in an automobile owned and operated by her husband, she was injured in a collision between the automobile and a truck, and that the collision was caused by the joint and concurrent negligence of her husband and the truck driver. At the time of the injury plaintiff and her husband were domiciled in North Carolina. The lower court sustained defendant's demurrer to the complaint and on appeal the supreme court affirmed. The court recognized that Virginia, unlike North Carolina,³ does not permit a married woman to sue her husband for injuries negligently inflicted.

Shaw v. Lee was not a case of first impression. It reaffirmed North Carolina's previous position⁴ and is in accord with the ma-

⁶¹ 203 F. Supp. 830, 832-33 (E.D. Wash. 1961).

¹ *Doss v. Sewell*, 257 N.C. 404, 125 S.E.2d 899 (1962); *Morse v. Walker*, 229 N.C. 778, 51 S.E.2d 496 (1949); *Wise v. Hollowell*, 205 N.C. 286, 171 S.E. 82 (1933); 2 BEALE, *CONFLICT OF LAWS* § 378.2 (1935); *RESTATEMENT, CONFLICT OF LAWS* §§ 377-79 (1934); *STUMBERG, CONFLICT OF LAWS* 182 (2d ed. 1951).

² 258 N.C. 609, 129 S.E.2d 288 (1963).

³ "A husband and wife have a cause of action against each other to recover damages sustained to their person or property as if they were unmarried." N.C. GEN. STAT. § 52-10.1 (Supp. 1961).

⁴ *Howard v. Howard*, 200 N.C. 574, 158 S.E. 101 (1931), is practically